PROPOSED ADMINISTRATIVE RULES – CR03-111; HFS 117
ANALYSIS FOR LEGISLATIVE STANDING COMMITTEES
PURSUANT TO S. 227.19 (3), STATS.

Basis and Purpose of Proposed Rules

Section 146.83 (3m), Stats., as created by 2001 Wisconsin Act 109 and s. 908.03 (6m) (d), Stats., as amended by 2001 Wisconsin Act 109, direct the Department to prescribe by rule fees for reproducing patient health care records that are the maximum amount a health care provider may charge. The fee limits are to be based on an approximation of actual costs. The final proposed rules that the Department is recommending attempt to comply with this legislative directive.

Unless superseded by fees established by other applicable law, the fee limits proposed by the Department in HFS 117 will apply to all persons who, upon request, provide copies of health care records to either individuals who are the subject of the records, their personal representatives, or other parties who are authorized to receive copies of records. The Department has proposed separate fee limits dependent on who is requesting the copy of the record. One set of fee limits, in HFS 117.05 (2), applies only to individuals and their personal representatives as defined in this rule who make the request for record copies. In such cases, a record supplier may charge no more than $0.31 per page for copies of the records. Postage is extra. A second fee limit, in HFS 117.05 (3), applies to all others making a request for records they are authorized to receive. In such cases, , the record supplier may charge no more than $15.00 per request (or no more than $12.50 per request for requests totaling under five pages) plus $0.31 per page. The “per request” amount may be deemed a retrieval fee that individuals need not pay for copies of their own records. The fee limit for copies of x-rays is proposed to be $5.25 per page, regardless of the number of x-ray images on the page or who requests the copy. Finally, the Department is also proposing a fee limit of $7.50 (or $5.00 for requests totaling less than five pages) if the requester wishes the provider to certify the records supplied.

The Department's authority to amend and repeal and recreate these rules is found in ss. 146.83 (3m) and 908.03 (6m) (d), Stats. The rules interpret ss. 146.83 (3m) and 908.03 (6m) (d), Stats.

The Department believes it has done its best to comply with its legislative directive. It has proposed a fee limit rule that:

- has a workable structure that is compatible with federal law and is simple to administer;
- is, or should be, uniformly understood by all affected parties; and
- states a fee limit that reasonably approximates the average actual cost of reproducing a medical record.

Changes to Rulemaking Order Analysis or Fiscal Estimate

- *Changes to Rulemaking Order Analysis*

The Department significantly revised its analysis section from that in the initial proposed order. The bulk of the changes were due to 2003 Wisconsin Act 118, which mandated changes to the content of several administrative rule-related documents. Specifically, the Department:

- Changed the format of the analysis to conform with newly-required areas required to be addressed;
- Expanded the analysis section from its original two pages to almost seven pages to address the information newly-required under s. 227, Stats.;
- Added a section regarding the effect of the rules on small businesses;
- Added a section regarding the (largely unknown) fiscal effect on the private sector;
- Added a section that describes how the proposed rules relate to pertinent federal regulations; and
- Added a section that describes the relationship of the proposed rules to comparable rules in adjacent states.

- *Changes to Fiscal Estimate*

The final proposed rule contains no changes that require an amended fiscal estimate.

Response to Clearinghouse Recommendations

The Department accepted all of the Clearinghouse comments except for the following:

Comment 5.a. (in part): In the first paragraph of the analysis, the word "requires" should be replaced by the phrase "requiring that."

Response: The Department believes that replacing the "requires" with the phrase "requiring that" would leave the sentence without a verb. Therefore, the Department has replaced the word "requires" with the phrase "requires that."

Final Regulatory Analysis

When an agency, such the Department, proposes a rule that may have an effect on small businesses (defined as entities that are independently owned and operated and not dominant in their field, and employ fewer than 25 full-time employees or have gross annual sales of less than $2.5 million), section 227.114, Stats., requires that agency to consider several methods for reducing the effect of the proposed rule on those small businesses. The revision of ch. HFS 117 will affect many small businesses, principally law firms that request health care records on behalf of clients, and small health provider offices that maintain and supply their patients' health care records to those authorized to request those records. The fee limits specified in ch. HFS 117 also will effect a small number of businesses that reproduce medical records on behalf of health care providers and transmit those records to authorized record requesters.

Chapter HFS 117 does not require compliance with any reporting, bookkeeping or other procedures. Nor does the proposed rule impose new requirements for professional skills that are not currently required to comply with requests for copies of health care records. Given that the proposed rules do not require reporting, bookkeeping or other procedures and skills, the question of exempting particular small businesses from some or all of HFS 117's provisions is moot.

The Department also cannot estimate the effect of the proposed rule on the above small businesses other than to note that the fee limits the Department proposes to specify in HFS 117 are both higher than those specified in the existing HFS 117 rules and applicable to a much greater variety of circumstances. Indeed, ch. HFS 117 will apply to all medical record requests that aren't covered by other applicable law or private contract. The Department believes that exempting certain law firms and health care providers from the rule's applicability would be contrary to the

legislature's intent that, to the extent possible, the rule specify a fee limit for all parties. Similarly, the Department believes that specifying a lower fee limit for particular law firms (or a higher fee limit for particular health care providers) would also be contrary to legislative intent.

Comments on Proposed Rule

- *Public Hearing Summary*

The Department held one public hearing on the proposed rule in Madison on December 15, 2003. Larry Hartzke and Dan Stier, of the Department's Office of Legal Counsel staffed the hearing. Fifteen people attended the hearing. Three persons provided oral testimony in favor of the proposed rule, two provided oral testimony against the proposed rule as written, and ten persons simply observed the proceedings. The Department's comment period remained open until Tuesday, December 30th. During the public comment period, which lasted from early November to December 30th, the Department received written comments from 35 persons. Generally, most representatives of medical record requesters supported the proposed rules. However, all of the comments the Department received form medical record maintainers reflected opposition to the Department's proposed rule. The specific comments and the Department's responses to the comments are contained on a subsequent table in this report. All written comments may be viewed in their entirety at the Department's website for the rules' promulgation at:
http://apps3.dhfs.state.wi.us/admrules/public/Home
(Enter the search term "HFS 117." Once at the rulemaking page for HFS 117, select the "Comments" tab to view any of the submitted comments.)

- *Public Comments Summary*

There are two opposing groups who are particularly interested and involved in the revision of ch. HFS 117. Indeed, the Department took pains to ensure that the advisory committee it formed to oversee the Department's development of a proposed rule evenly represented both groups. One group is trial attorneys who frequently request the medical records of their clients for the purpose of assessing the potential for legal action and insurers for the purpose of assessing and reimbursing medical care rendered. The Department refers to these groups collectively as "medical record requesters." The opposing interest group is those who are responsible for supplying the pertinent medical records, i.e., health care providers, medical record professionals, and entities that reproduce patient medical records on behalf of health care providers. The Department refers to these groups collectively as "medical record maintainers." The medical record requester side in this contentious promulgation generally supported the Department's initial proposed rules, while the medical record maintainer side strongly objected to the Department's proposed rules.

Medical record maintainers submitted most of the substantive comments the Department received on its initial proposed rule. Those comments were largely unsubstantiated assertions regarding two issues: 1) the deleterious financial effect of the Department's proposed fee limits on hospitals; and 2) the need for the Department to raise the amounts the Department assigned to various elements of its medical record reproduction cost model upon which the Department derived its proposed fee limit.

If the Department fully accepted all medical record maintainer assertions of higher amounts attributable to selected cost components of the act of complying with requests for copies of medical records, the "per request" component of the Department's proposed fee limit would be about 45% higher, while the "per page" component of the fee limit would be about 38% higher. The two cost components which would have the greatest effect on the Department's estimated fee limit are the

prevailing labor rates for complying with requests to reproduce medical records, and the cost of retrieving records from off-site storage. With respect to prevailing labor rates, in both its initial proposed rules and the accompanying final proposed rules, the Department has presumed an average labor rate, including benefits, of $16.00 per hour. Some medical record maintainers contend, but have not substantiated, that the average labor rate for complying with requests for copies of records is $20-21 per hour, instead of $16. Increasing the labor rate by $4-5 would increase the "per request" fee limit by about $4.00 and the "per page" fee limit by about $0.08.

With respect to the cost of retrieving and returning medical records from "off-site" storage, a key representative of medical record maintainers asserts, but has not substantiated, that 20% of medical record requests require retrieval of records from off-site storage at an average cost of $17 per request. If the Department fully incorporated recognition of those asserted costs for retrieval of records from off-site storage, doing so would add $3.40 ($17 times 0.20) to the "per request" component of the fee limit.

While the Department has not accepted either of these assertions due to lack of substantiation/documentation, the Department recognizes their potential impact on increasing the "per request" fee limit and reports those impacts here for the benefit of the legislature.

- List of Hearing Attendees and Commenters

The following is a complete list of the persons who attended the public hearing or submitted written comments via letter, fax or e-mail on the proposed revisions to Ch. HFS 117. With each person's name and affiliation is an indication of the individual's position on the proposed rules and whether or not the individual testified or provided written comments. The number preceding a name serves in the summary of hearing comments to indicate the person who made the specific comments.

Name and Address	Position on Revision	Action
1. Bernard T. McCartan State Bar of Wisconsin 6000 American Pkwy Madison, WI 53783	Supports proposed rule as written.	Oral testimony and written comments.
2. Mary Itzin Iron Mountain Health Information Services 5170 S. 6th St. Milwaukee, WI 53221	Opposes proposed rule as written.	Oral testimony and written comments.
3. Michael Wickman SOURCECORP 2519 Huntington Ways Suamico, WI 54173	Opposes proposed rule as written.	Oral testimony and written comments
4. Cheryl Quimby 1030 Ontario Rd. Green Bay, WI 54308	Opposes proposed rules as written.	Oral testimony.
5. Janet Swandby 44 E. Mifflin St. Madison, WI 53703	Opposes proposed rule as written.	Observer at hearing and provided written comments.
6. Chrisann Lemery 2826 Black Bridge Janesville, WI 53545	Opposes proposed rule as written.	Observer at hearing and provided written comments.
7. William Donaldson Wisc. Board on Aging & Long-Term Care 1402 Pankrantz St., Suite 111 Madison, WI 54704	Advocates changes to the proposed rules to ease the financial burden on nursing home residents covered under Medical Assistance.	Provided oral testimony.
8. Bruce Bachhuber Wisc. Academy of Trial Lawyers 44 E. Mifflin St. Madison, WI 53703	Supports proposed rule as written.	Oral testimony.
9. Deb Sybell State Bar of Wisconsin Madison, WI	Supports the proposed rule as written.	Observer at hearing.
10. Scott Froehlke Wisc. Academy of Trial Lawyers 44 E, Mifflin St., Suite 103 Madison, WI 53703	Supports proposed rule as written.	Observer at hearing.

11. Ruth Simpson Wisc. Academy of Trial Lawyers 44 E. Mifflin St. Madison, WI 53703	Supports proposed rule as written.	Observer at hearing.
12. Michael Blumenfeld Blumenfeld & Asso. 16 N. Carroll St., Suite 800 Madison, WI 53703		Observer at hearing.
13. Kelly Rosati Wisc. Assn. Of Health Plans N9476 Pine Valley Lane Wis. Dells, WI 53965		Observer at hearing.
14. Pamela Stampen 6730 Frank Lloyd Wright Ave. Middleton, WI 53562		Observer at hearing.
15. Kathryn A. Ambelang Wisc. Physicians Service (WPS) 1717 W. Broadway Madison, WI 53715		Observer at hearing.
16. Bob Andersen Legal Action of Wisconsin, Inc. 31 S. Mills St. Madison, WI 53725	Requests revisions to proposed rule.	Written comments.
17. Sue Griswold Shawano Medical Center 309 N. Bartlette St. Shawano, WI 54166	Opposes the proposed rule as written.	Written comments.
18. Cathy Hansen St. Croix Regional Medical Center 204 S. Adams St. St. Croix Falls, WI 54024	Opposes the proposed rule as written.	Written comments.
19. Maureen McNally Froedtert Hospital 9200 W. Wisconsin Ave. Milwaukee, WI 53226	Opposes the proposed rule as written.	Written comments.
20. Thomas Kirschbaum Dean Health System 1808 W. Beltline Highway Madison, WI 53713	Opposes the proposed rule as written.	Written comments.
21. Kay Naatz Myrtle Werth Hospital 2321 Stout Road	Opposes the proposed rule as written.	Written comments.

Menomonie, WI 54751		
22. Paul F. Soczynski Community Care Organization 1555 S. Layton Boulevard Milwaukee, WI 53215	Seeks exemption from proposed rules.	Written comments.
23. Beth Malchetske ThedaCare, Inc.	Opposes the proposed rule as written.	Written comments
24. Debbie Buckman St. Vincent Hospital P.O. Box 13508 Green Bay, WI 54307	Opposes the proposed rule as written.	Written comments.
25. Stephen F. Hansen Hansen, Shambeau, Maroney & Anderson, S.C.	Supports the proposed rule as written.	Written comments.
26. Kaye E. Anderson Hansen, Shambeau, Maroney & Anderson, S.C.	Supports the proposed rule as written.	Written comments.
27. Dave Jackson Midwest Medical Record Assn. 999 Plaza Dr., Suite 690 Schaumburg, IL	Opposes the proposed rule as written.	Written comments.
28. Stuart Spaude Appleton, WI	Advocates adoption of fee structure for worker's compensation and personal injury claims into HFS 117.	Written comments.
29. Elizabeth Schumacher Wisc. Medical Society Madison, WI	Opposes the proposed rule as written.	Written comments.
30. Dawn Stoller Paralegal 733 N. Van Buren Street, 6th floor Milwaukee, WI 53202	Advocates revisions to proposed rules as written.	Written comments.
31. Laura Leitch Wisc. Hospital Assn. 5721 Odana Rd. Madison, WI 53744	Opposes the proposed rule as written.	Written comments.
32. Michole Madden Assistant to the Office of General Counsel Wisconsin Medical Society 330 E Lakeside Madison, WI 53715	Suggests clarifications to proposed rule as written.	Written comments.
33. Jeff Zirgibel Karp, Karp & Zirgibel, S.C. 2675 N. Mayfair Road, Suite 300	Advocates revisions to the proposed rule.	Written comments.

Milwaukee, WI 53226		
34.Richard Freiwald Iron Mountain Health Information Services 5170 S. 6th St. Milwaukee, WI 53221	Opposes proposed rule as written.	Written comments.
35. Marianne Baumgarten Reedsburg Are Medical Center Reedsburg, WI 53959	Opposes proposed rule as written.	Written comments.

Public Comments

Comment Sequence Number and Rule Reference (as found in initial proposed rule order)	**Comment** (**numbers** are associated with person listed on the list of hearing attendees and commenters)	**Department Response**
1 General	Those DHFS staff who made the changes to the draft clearly did not take into consideration the comments and data that were presented on behalf of AHIOS after the Advisory Committee meeting, nor does the draft reflect any knowledge of the process of duplicating patient health care records. **5**	The Department has considered all information that has been presented to it and has earnestly attempted to construct a representative cost model of the medical record reproduction process and populate the components of that model with reasonably accurate data in an open forum. The Department has modified its proposed fee limits on several occasions over the past year based on its consideration of a variety of factors, including: - whether a reasonable person would deem the source of the information to be a knowledgeable source of the information; - whether the source of information has supplied documentation that substantiates the information the source presents; and - the extent to which the information presented is validated by other similar or related information known to the Department, such as that provided in the literature or presented by other sources.
2 General	Keep the current statute in place. **2, 34**	The Department does not have the ability to change the Wisconsin statutes; only the Wisconsin legislature has that power. Moreover, the Department did not advocate changing the previous statutory language regarding medical care record copying fees.
3 General	Supports the proposed rule. Commenter #8 stated that his group's support is based on their belief that the proposed rules will stabilize and create uniformity for members when obtaining copies of duplicate medical records, and that, while believing the fee limits proposed by the Department to be too high, also believes that they represent a compromise between the principal affected parties who have been	No response needed.

		involved with the revision of statute and these rules. **1, 8, 25, 26**	
4	General	The Department is inconsistently exercising its prerogative to adopt administrative rules by claiming broad authority under s. 227.11(2)(a), Stats., for the promulgation of chs. HFS 79 and HFS 2, but claiming inadequate statutory authority for ch. HFS 117. The Department has broader authority to adopt rules for ch. HFS 117 than it does for ch. HFS 79 (relating to SSI overpayment recoupment and proposed ch. HFS 2 (relating to foster care overpayment recoupment.) **16**	The Department disagrees. Section 227.11(1) begins by declaring that, "except as expressly provided," ch. 227 does not confer rulemaking authority upon or augment the rulemaking authority of any agency. Section 227.11(2) confers a generic rule creation authority, but only for situations in which the state agency in question is enforcing or administering some other statute. In the case of HFS 117, the Department is not enforcing or administering another statute. The Department is revising HFS 117 solely because sections 146.83(3m) and 908.03(6m)(d) require the Department to create rules declaring a copy fee limit. Neither 146.83(3m) nor 908.03(6m) give the Department ***any*** enforcement power, and neither statute gives the Department ***any*** ongoing program to administer. The Department simply is revising rules that declare fee limits, and, once having done so, the Department's responsibility is done until the time comes for engaging in the next periodic review of those rules. The HFS 117 situation simply does not qualify under section 227.11(2). In contrast, the Department actively operates the state SSI program in Wisconsin. (See sections 49.77 and 49.775, and see the definition of "department" in s. 49.66, which declares that the "department" is DHFS.) The Department's act of recouping benefit amounts that had been incorrectly paid to recipients of benefit programs (the topic of proposed HFS 2) begins with the fact that the Department administers a benefit program that paid out benefits in the first place. Furthermore, the Department of Administration has assigned to state agencies certain accounting and bill collection tasks. Unlike the HFS 117 situation, DHFS has an active enforcement or administrative role for HFS 79 and HFS 2. Mack v. DHFS, 231 Wis.2d 644 (1999), challenged the Department's efforts to recoup SSI state supplemental payments that had been erroneously made. The court acknowledged that a government agency has a

			common law right to recover erroneous payments, but the court stated that if the agency wanted to do so via a recoupment from future benefit payments, the agency needed a rule. Therefore, the Department is promulgating HFS 2. In sum, the Wisconsin Court of Appeals has clearly recognized an agency's legal authority to collect via the means of adopting an administrative rule.
5	General	The Department should have used an independent source to provide a forensic accounting analysis to determine the approximate actual costs. The composition of the Committee itself should have dictated this course of action as there was only one member who could have provided the Department with any data taken from an actual health care setting that could have possibly demonstrated those costs the Department was to determine. The Requestors never offered hard data to support or refute any position, and the even the majority of the Maintainers outsource the release of information function and would have to rely on data supplied by their agents. There is some great irony that the Requestors who drove the process to amend the statutes offered no data to help the Department determine approximate actual costs. **27**	The Department believes that each of the seven medical record maintainer representatives on the advisory committee could have contributed pertinent information toward approximating actual costs, and, as the documents posted by the Department shows, several of them did. The Department solicited, but did not expect, record requester representatives to supply relevant information regarding record reproduction costs. Logic dictates, however, that record requesters, as is the case with customers generally, are not in the position to know the time and costs required to produce the service or product they are receiving. To approximate the "actual costs" specified in the authorizing statutes, the Department had to rely on data from medical record maintainers. The only reasonable alternative would have been for the Department to commission or conduct original time-study research of record reproducers' functions; something the Department had neither the time nor funds to conduct.
6	General	As we feel the proposed rules changes serve only a narrow group interest, we would be interested in the Department demonstrating how the proposed rules changes serve the broad public interest and also demonstrate the benefits derived by all the affected parties. **27**	The Department believes that the legislature presumed the "broad public interest" would be served by the Department's effort to specify fee limits that approximated actual medical record reproduction costs. Achieving consensus on what fee limit best serves the broad public interest is unlikely to be achieved. Consequently, the Department devoted its efforts to attempting to objectively respond to its legislative directive. Ultimately, it is for the legislature, at whose behest the Department has proposed these rules, to

			determine whether these rules are sufficiently in the public interest. The Department admits that without a much more rigorous and verifiable cost analysis across numerous medical record maintainers, the true "actual cost" is very difficult to determine, and will always be contentious.
7	General	The statutes and administrative regulations have not clearly addressed this issue. The current controlling laws, Wis. Stats. sec. 908.03(6m); HFS 117 as it currently reads, and Wis. Stats. sec. 146.83 have been difficult to apply. Health care providers and other entities such as law firms representing patients have not agreed on the interpretation of the language of these provisions as they apply to the fees for copies of medical records. This has caused health care providers to spend time and money trying to interpret and implement the existing fee structure in its daily operations. The law is so confusing that Dean has, been involved in litigation related to medical record fees. Establish a clearly defined fee structure that will not be subject to further interpretation by the entities making the request. If the Department does not consider these issues in its rulemaking process, the final product will be a rule that continues to produce disputes between health care providers and entities requesting records. **20**	The Department agrees that, to the extent possible, it should strive to specify rules that are clear and not subject to varying interpretations. To do less is a disservice to the public. Moreover, the Department certainly agrees that, over the past 10 years, there has been widespread confusion regarding the applicability of HFS 117. That confusion and disagreement among affected groups is likely to have been one of the reasons the legislature modified the applicable statutes. However, the Department believes that, in the course of this rule's development, whenever the Department received comments from interested parties asking for clarification about an ambiguity about the rule's application, or pointing out a source of possible confusion, the Department responded by providing sufficient clarity to the proposed rule. Consequently, the Department believes that the proposed rule's applicability is sufficiently clear.
8	General	The rule should include some authority for HFS to enforce it rule as against any person who violates the rule, health care provider or not. **33**	The Department believes that such authority would need to be conferred to the Department by the legislature through statute. However, the pertinent statutory provisions do not convey such authority to the Department. The Department believes it does not have sufficient statutory authority to enforce HFS 117.
9	HFS 117.02	**"Maximum" fees versus uniform fees:** The draft rule states that the purpose of this chapter is to "establish uniform fees that are the maximum fees that may be charged…" By setting a "maximum" fee, various entities requesting records may continue to argue that a lower fee should be applied to their request for some reason. **Recommendation:** The rule should establish a uniform fee structure that is clearly defined, not a "maximum" fee that could still be subject to interpretation by the persons requesting or providing the information. **20**	The Department disagrees. Section 908.03(6m)(d) directs the Department to prescribe "uniform" fees. However, both sections 146.83(3m)(a) and 908.03(6m)(d) direct the Department to prescribe fees that are the "maximum amount that a health care provider may charge…." Consequently, the Department has no choice but to specify maximum fees in HFS 117.

	Suggests that the Department specify a uniform fee in ch. HFS 117, not a maximum fee. The goal of the law giving the authority to the Department was to set a consistent or uniform fee for providing duplicate copies of patient health care records. The language in the rule stating that a health care provider "*may* charge the requester *no more than* the following fees" is harmful. If the rule is truly based on the actual costs of providing the service, then all providers should be charging a uniform fee which is set specifically in the rule. In every state in which such a vague cap is the law, hospitals and release-of-information companies have been sued over the amount charged because of such "no more than. . ." language. Avoiding such litigation is a primary impetus for passing specific rate-setting legislation. **5** Dean Health Systems is concerned that the draft rule will not lead to clarification and simplification when determining the cost for copies of health care. **20**	The Department cannot eliminate disagreements about the statute language. Indeed, some requesters may represent parties particularly deserving of free or reduced-fee copies, but the Department does not believe it has the requisite authority to specify exceptions or exemptions for particular parties or groups in HFS 117, or to declare that all providers/record maintainers must charge a particular fee even if their own actual costs happen to be lower than that fee. Unless applicable laws (federal regulations, Wisc. statutes) supercede and provide for lower fees, medical record providers/maintainers are under no obligation (outside of contractual arrangements to the contrary) to accede to record requesters' requests for lower fees, regardless of the reason. Providers/record maintainers do have the power to charge less than the HFS 117 fee limits if they wish to do so. If the legislature wishes to prohibit providers/record maintainers from charging less than the HFS 117 fee limits, a statute amendment would be needed.
10 HFS 117.02	Maintains that proposed fee limit for requesters is unaffordable for either the low-income persons applying for eligibility for state and federal public SSI benefits or the entity representing those persons. Therefore, recommends revising s. HFS 117.05 (2) to specify a lower fee limit in cases where a requester is involved in judicial or administrative proceedings regarding the person's receipt of public benefits from a government program. Maintains that nothing in federal or state law prohibits the Department from extending a lower fee to persons requesting information in judicial or administrative proceedings regarding the individual's receipt of public benefits from a governmental source. Claims that, based on the fiscal estimate, such a revision would save the state at least $623,000. **16** Requests that the Program of All-inclusive Care for the Elderly (PACE) and the Wisconsin Partnership programs be exempt from charges for duplicate copies of medical records because providers of medical records occasionally charge them a fee for duplicate copies. **22**	Commenter #16 can be assured that Department is anxious to conserve its monies. However, it believes that its desire to conserve its resources cannot override the legislature's directive to specify fee limits that approximate actual (record reproducer) costs. The Department believes that for it to specify fee limits from the perspective of being a medical record requester instead of that of an entity attempting to approximate actual costs in an unbiased manner would be a wrong approach. As it stated in response to the fourth "general" comment (also put forth by commenter #16), the Department believes that it does not authority to either exempt or favor particular groups of affected persons without explicit legislative authority to do so. If the legislature were to give such favored status to one or more affected groups, the Department would certainly reflect that decision in HFS 117.

		Requests that the proposed rule specify that residents of nursing homes whose care is funded by Medicaid receive their copies of records free of charge. **7**	
11	HFS 117.03	It is not necessary to create another definition for “health care records”. Health care records means those records as defined in Wis. Stat. 146.82(2)(d) and qualify as “designated record set” under 45 CFR 164.501(1)(i). **6**	The Department agrees that it is not necessary to create another definition for health care records and has modified HFS 117.03(3) accordingly to cross reference s. 146.81(4) [which, in turn, references 146.82(2)(d).] However, the Department believes that reference to 45 CFR 164.501(1)(i) is not necessary insofar as doing so would not add anything significant to or clarify the definition in HFS 117.
12	HFS 117.03(4)	**Personal Representatives:** We appreciate the Department's provision to allow a retrieval fee for requests made by individuals other than the patient or the patient's personal representative. This is consistent with the requirements under the Health Insurance Portability and Accountability Act of 1996 (HIPAA). If a request for copies is made by someone other than the patient or the patient's personal representative, a retrieval fee can be charged. However, the phrase "personal representative" is defined under 45 CFR 164.502(g), of the HIPAA regulations. Attorneys specializing in HIPAA issues have had protracted debates on the application of the definition of "personal representative" under the HIPAA regulations. We are concerned that the varying definitions for this phrase will open up the door to requests that technically should be calculated at one fee (including the retrieval fee), but the requester (an attorney representing the interests of the patient in some legal matter, for example) may forcefully argue they are entitled to a lower fee. Then health care providers will be asked to administer a fee structure that is still open to interpretation, which will lead to disputes regarding the proper fee to charge. **Recommendation:** The rule will be much stronger if there is a clear definition of "personal representative." If the HIPAA regulations will still be cited for the definition of "personal representative" we would ask that the Department include clarification that attorneys representing the patient in a legal matter or other entities that have a business relationship with the patient are not included in the definition. Clearly define the phrase "patient representative" so that there is no misunderstanding regarding the requests that will not include a retrieval fee versus the requests that should include a retrieval fee. **20**	HFS 117, as proposed, does not use the term “patient representative.” The Department has attempted to be as clear as possible in stating that HFS 117.05 specifies one fee limit for two classes of parties. The first is individuals (or their “personal representatives”) who request a copy of their own health care records. The second class is everyone else, including attorneys representing patients in a legal matter, regardless of the stage of that legal matter. The Department makes this clear when it states in HFS 117.05(3)(intro): “If a person is requesting copies of another person’s health care records and the person making the request is not the personal representative of the patient, a health care provider may charge the requester no more than the following fees:” Further, the Department addresses the question of who is a “personal representative” by specifying in HFS 117.03(4) that a personal representative is a person who has ***both***: 1) the authority under state law to act on behalf of the patient; and 2) qualifies as a “personal representative” under 45 CFR 164.502(g). The federal regulation relies upon the categories of people who have authority under state law to make health care decisions on behalf of the patient, such as a parent or guardian of a minor patient or a guardian of an adult patient, but the federal regulation has certain

	The definitions of “patient representative” and “personal representative” are confusing and need clarification. The definitions of "patient representative" and "personal representative" as included in Wisconsin law and under federal HIPPA have different meanings. Froedtert believes that the rule should be altered so that the definition is consistent with the federally mandated language. **19** Clarify the conflicting definitions of “patient representative” and “personal representative” in the rule. The federally mandated HIPAA definition of “personal representative” differs from the proposed Wisconsin language for “patient representative.” The Society suggests that Wisconsin language be consistent with federally mandated language. **29** The Department is confusing the definition of “personal representative” in HIPAA and “patient representative” in Wisconsin law. “Personal representative” is a specific term in federal law meaning someone who is acting on behalf of someone WHO CANNOT ACT FOR THEMSELVES. HIPAA specifically cites (1) parents/guardians of minors, and (2) executors of estates of deceased persons. This is very different from Wisconsin law’s “patient representative”. This confusion will present significant and unnecessary problems in the implementation of the uniform fee. HIPAA defines who the “individual” is (the person who received treatment), and who else can have access to a record on behalf of a patient and, therefore, has to pay only for the cost of copying the record. All other third parties (including “patient representatives” under Wisconsin law) will be covered by HFS 117 and will pay Wisconsin’s fee. There is no need to change, or refer to, the definition in Wisconsin law. **5**	exceptions. The federal concept of a “personal representative” also differs considerably from the usage of the phrase in the Wisconsin statutes. In Wisconsin, the term “personal representative” in statutes means a person who is authorized to administer a decedent’s estate (referred to in many other states as an executor or administrator of the estate). See the definition in Wisconsin statute section 990.01(27m), and its use in section 146.81(5). Wisconsin law cannot constrain the parameters of federal regulations. Because of the fact that the person with authority to act on behalf of a patient in Wisconsin varies with the variety of medical setting (some varieties of medical care in Wisconsin have statutes with special requirements concerning consent for that variety of medical care), and because there indeed are exceptions in the federal regulation, the Department has not found a ready way to create a list of which people under which circumstances will qualify for the lower fee under HFS 117 that is required by the federal HIPAA provisions. The preceding response may, however, be based on a misunderstanding of the commenters’ intent. If the thrust of the commenters was that they interpret the title and introduction of HFS 117.05(2) as being confusing in stating “patient or personal representative,” the Department has amended the language to clarify that HFS 117.05(2) applies only to individual “patients” or “personal representatives” of patients; not to “patient representatives,” which “the phrase “patient or personal representative” might imply to a reader.
13 HFS 117.03(4)	It is unreasonable not to include the plaintiff's attorney, irrespective of the matter involved, as in the stead of the plaintiff. The plaintiffs attorney is acting for the plaintiff and the two are indistinguishable for purposes of obtaining records of the plaintiff. I would strongly suggest you reconsider that portion of the rule. **33**	To maintain consistency with the federal HIPAA regulations and federal policy interpretations of HIPAA, the Department has structured HFS 117 so that the lower “individual” fee limit does not apply to an attorney requesting a client’s medical records. The Department’s position is strongly influenced by federal commentary responding to a comment on page 53254

			of the August 14, 2002 Federal Register. In the response, the federal government clarifies that the limited cost components specified under the HIPAA regulation in 45 CFR 164.524(c)(4) apply ***only*** to individuals' and individuals' personal representatives' requests for copies of individuals' medical records. It also states that "The fee limitations in 164.524(c)(4) do not apply to any other permissible disclosures by the covered entity, including disclosures that are permitted for treatment, payment or health care operations, disclosures that are based on an individual's authorization that is valid under 164.508, or other disclosures permitted without the individual's authorization as specified in 164.512."
14 HFS 117.05		**The draft rule does not establish one fee structure:** There is one retrieval fee for requests up to 5 pages, and a second retrieval fee for requests totaling 5 or more pages. There is one rate for certifying up to 5 pages of records and a second rate for certifying 5 or more pages of records. The cost to retrieve records does not increase significantly if the number of copies is greater. The cost to certify records does not increase significantly if the number of copies being certified is greater. The fact that there are still many variables in calculating the fees charged for medical records will make this rule more difficult to administer. **Recommendation:** Establish a single fee structure based on a per page rate for the records, regardless of the volume of records produced. Establish one retrieval fee regardless of the number of pages being certified. Establish one certification fee regardless of the number of the pages being certified. **20** It is illogical and unclear how or why the Department arrived at a two-tier fee. **24, 6, 35** The Department does not explain the process it used to develop the two-tier fees. The two-tier system is not substantiated by actual costs. The two-tier system is based on number of pages, but the facts presented to the Department did not provide any evidence that the effort required to retrieve and review a patient's record is related to the number of pages, which are ultimately copied and sent to the third party requester. Instead, the Department has added a burden to the maintainers to administer two fee structures for this rule's requests along with administering two other	The Department recognizes that the two tiers of fee limits it has proposed may be based on reasoning that, while intuitive to the Department, may not reflect the reality as stated by the commenters. Furthermore, the Department does not wish to promulgate a rule that is difficult to administer or is a burden to comply with. However, the Department does not agree that the two tiers of fee limits it has proposed are unreasonable, difficult to administer or a burden to comply with. The Department recognizes that all costs cannot neatly and cleanly be classified as either solely "fixed" (regardless of record quantity) or "variable" (dependent on the record quantity.) In particular, the staff time expended for complying with retrieving records, while "mostly fixed," may be expected to be vary somewhat insofar as responding to a very small number of records may be expected to take significantly less than the 15 minutes the Department has estimated for a 25-page record. In addition, one could reasonably assume that copier equipment costs, while designated as "mainly fixed," might also be less to the extent that the copier is used less. Therefore, an argument may be made that requests generating a very small number of record copies, e.g., less than five, should have a lower "per request" cost component. If one assumes that a small number of copies consumes 10 minutes

	fee structures for workers compensation requests, Social Security Disability requests, and mental health requests. Therefore, maintainers potentially will have five fees to administer (or four, according to commenters #21 and 35.) **6, 17, 18, 21, 24, 35** Creating two base fees dependent on the number of pages copied is unprecedented and completely illogical. No other state sets two different base fees. There is absolutely no evidence that the effort required to retrieve and review a patient's record and validate the authorization or interpret and apply the appropriate law are related at all to the number of pages which are ultimately copied and shipped to the third party requestor. **5** Does not support the differential fee structure as currently proposed because there is no real difference between the cost of the copying process for a record requested by a nursing home resident and the cost of coying the same record requested by someone else. **7** The proposed rule includes two tiers for fixed fees with the tiers based on the number of pages copied. Fixed fees that presumably are to cover fixed costs should not vary depending on the number of pages copied if the fee represents a fair approximation of actual fixed costs. WHA asks that the rule not include tiers for fixed costs based on the number of pages copied. **31**	instead of the 15 minutes the Department estimated for 25 pages of records and that the copier equipment cost per request is $0.10 instead of the $0.20 the department estimated for 25 pages of records, the per request cost becomes $12.50. While the Department recognizes that this approach takes the Department away from a single, uniform fee, the Department also is trying to minimize the fee limits for very small record requests while remaining true to the statutory directive to approximate actual costs. The Department recognizes that, ultimately, any fee limit structure is going to be a compromise among the goals of approximating actual costs, recognizing the effect of HIPAA, and specifying a single, uniform fee applicable to all under all circumstances. The Department recognizes that there is a large discrepancy between the fee limits for requests made by individual for their own records and requests made by others. The Department continues to believe that it is reasonable to assume that the process of certifying records is ***somewhat*** dependent on the volume of records insofar as some of the tasks involved may take the same amount of time regardless of the number of records certified. Therefore, while the Department believes a totally variable "per page" cost is not appropriate for certification, the Department continues to propose a lower $5.00 fee for certifying less than five records. In response to those advocating that the Department somehow merge HFS 117.05 (2) and (3) into a single limit for all requesters, the Department believes that it cannot recommend such an approach without ignoring pertinent and controlling federal regulations that specify that charges to individuals for copies of their own medical records be limited to only the costs of copying, not retrieving, the record. Unfortunately, as the Department determined through its cost model, the bulk of the costs of complying with a request for records is attributable to retrieving the records.

15 HFS 117.05	Contrary to the Department's belief, nothing in the legislation being implemented or the official record of the legislation's creation suggests that it was legislature's intent to specify a single fee limit for all parties. 2001 Act 109 says nothing about "uniform fees" or a single fee limit. In fact, HFS 117.05, as proposed, specifies a two-tiered fee limit. **16**	Section 908.03(6m)(d) directs the Department to prescribe uniform fees, but not a single fee limit. The term "uniform" means "always the same; unvarying; consistent." Nothing would prevent the Department from specifying a dozen tiers of fees, as long as, once in effect, the fees in each tier did not change or vary.
16 HFS 117.05	The proposed fee limits are not based on actual costs a record reproducer incurs in reproducing a patient's health care record. It is unclear how the Department arrived at its proposed fee limit. Commenter #24 claims the proposed fee limits will result in an annual loss of at least $236.058.54 to St. Vincent Hospital. Commenter #17 claims that the proposed fee limits would result in an annual loss of $6,000 to Shawano Medical Center. Commenter #18 claims the proposed fee limits will result in an annual loss of at least $111,188 to St. Croix Regional Medical Care Center. Commenter #23 claims the proposed fee limits may result in the commenter's facility performing the task of complying with requests it receives for reproducing medical records, which would require an additional 12-15 FTEs at a cost in excess of $400,000. That amount does not include the cost to another, smaller facility of the commenter in New London. Commenter #21 claims that the proposed fee limits would result in at least a $140,000 annual loss to Red Cedar Medical Center. **24, 17, 18, 6, 23, 21, 31, 35** The total cost of these rules to the health care system throughout Wisconsin will be millions of dollars. **23** We find it problematic that not all cost factors associated with handling a request were included in the fee determination. Despite having figures we were able to supply from actual health care settings, the proposed rules changes ignore or attach only slight import on such factors such as overhead, collection expenses, and bad debt expense. That is simply poor methodology for determining actual costs. The statutory language allowed for these factors as they are operating expenses, so we feel the proposed rules changes don't reflect "approximate actual costs". We see the following groups as the major "affected parties": Health Care Providers, Attorneys, Patients, and Release of Information ("ROI") companies. With the exception of the Attorneys, we see neither direct nor indirect benefit to any of the other affected parties. The Patient group will be the most affected party, as they will pay for the cost benefits	Given the lengths the Department has taken to openly arrive at its proposed fee limits, the Department believes it should be very clear how it arrived at those limits. The Department's approach to the task of approximating actual costs was described in great detail in two documents prepared in the course of the Advisory Committee's work in 2003: 1. *Department HFS 117 Report* and 2. *Comments on Department HFS 117 Preliminary and Interim Reports and Department Responses*. The Department cannot comment on the cost estimates provided by the commenters, as none of the estimates are substantiated by supporting data or methodologies. However, the Department observes for the benefit of the legislature that the implication is that, if these random, sample hospital claims are correct, the initial proposed rules would have resulted in a total "loss" or forced subsidization of $5 to $10 million on the part of all Wisconsin hospitals. The Department sought to include all reasonably legitimate components of the task of reproducing a medical record and the expenses/costs of those components. The Department did not necessarily accept and reflect an individual record maintainer's reported costs if one or more items the maintainer reported was significantly discrepant from the estimate of those items the Department received from other comparable maintainers. The Department attempted to reflect overhead in its proposed fee limits. Specifically, in appendix 2 of the document *Comments on Department HFS 117 Preliminary and Interim Reports and Department Responses*, the Department did

	derived by Attorneys and their clients litigating claims. The Patients will bear those costs in several distinct ways: being charged for duplication that was done previously for free or at a discounted rate, and in the form of higher health care costs. **27** Establish reasonable fees based on the true costs of reproducing the records. **20** The Department's fees are not defendable in a court of law because it's not based on the actual cost as prescribed in the statute. **6** The proposed retrieval fee has been lowered from the originally proposed range of $14-$21 to $12.50-$15. The Society, among other interested groups, has provided documentation to DHFS clarifying that a higher retrieval fee is necessary. We urge you to consider at least a $20/per retrieval fee. **29** The Society is also concerned that the currently proposed per page fee is also dramatically low. We urge the department to increase the per page fee closer to $1 per page. The proposed per page fee does not accurately reflect the cost of staff time, staff overhead, space overhead, copier cost, toner costs, paper costs, among other costs. The Society recognizes that DHFS has used Rose Dunn's 1997 article, documenting copy costs, as a basis for changes. We urge you to use a more updated resource to set these costs. Technology has changed dramatically in the last six years, warranting a higher retrieval and per page fee. **29** The Society would accept a compromise of either a higher retrieval fee and lower per page fee or a lower retrieval fee and higher per page structure. An acceptable compromise would be either a $14 retrieval fee and $1.00 per page fee or a $20 retrieval fee and $.75 per page fee. **29** SOURCECORP opposes HFS 117 because the proposed fees will not adequately cover the costs of providing professional and quality-oriented ROI services. **3**	identify the ***nonlabor*** cost component titled "hard to define costs" and assigned a value of 12% to it. The Department used the 12% amount that was reported in the 1997 article documenting copying costs. As stated in that article, these costs included the largely fixed costs of: telephone charges to communicate with requesters; space expenses such as heat, light and air conditioning; administrative overhead costs such as supervisory expense, payroll administration and human resources involvement; training costs such as specialized seminars and reference books; accounting/bookkeeping expenses; legal counsel guidance; sales taxes; purchasing and receiving department support; and housekeeping. The Department considers these costs to meet the definition of "overhead" costs." While section 146.83(3m)(a), Stats., certainly permitted the Department to include "bad debt" or "collection" expenses in its calculation of a fee limit, that statute did not require the Department to include it in its calculation. (Indeed, 146.83(3m)(a) does not require the Department to reflect ***any*** of the expense types listed in statute.) The Department decided not to reflect bad debt expenses in the calculation of the fee limit because it believes that doing so would promote or legitimize what may not be the optimal practice of some medical record requesters to demand, and receive from medical record maintainers, fulfillment of record requests for reimbursement that is less than the medical record maintainers' cost to comply. As stated elsewhere in these responses, the Department did not consider it appropriate, or within its mission in this endeavor, to base its methodology for specifying fee limits on whether and how one affected group may be disadvantaged relative to another affected group. To do so would have biased the Department's approach to comply with the legislated statutory directive. The Department, with the assistance of representatives of major interested parties in this rule, attempted to specify in an open and logical manner, the cost of

		reproducing a medical record. The Department must assume that none of the involved parties knew of better data on the "actual costs" of medical record reproduction because such data was not presented to the Department. Hospital representatives have consistently told the Department that record outsourcing firms are often the most efficient and effective means of complying with record requests. The Department has no reason to doubt that assertion. However, the Department cannot either divine the true costs of such businesses to reproduce records nor force such businesses to disclose such pertinent data, which the Department presumes record reproducing businesses have. Those businesses have had ample opportunity to present pertinent analyses to the Department during 2002 and 2003. The Department has not received any information (other than unsubstantiated claims and the fee limits established by some other states) upon which it can specify a "per page" copying fee in the vicinity of $1.00 or more. The data the Department accumulated suggests that the variable costs of reproducing a medical record is substantially lower than $1.00 per page.
17 HFS 117.05	The average record request is 31 pages, but DHFS used an average record request size of 25 pages when constructing the schedule. **19** According to the extensive review completed to implement HIPAA, the average medical request results in 31 pages of documents. DHFS bases its proposed fee on 25 pages of documents. The additional six pages should be included in the Department's calculations, and the fee should be increased accordingly. **5** Medical record maintenance has become significantly more complex since 1997, requiring additional training and resulting in higher salaries. Records are located in multiple storage mediums, including electronic systems that require staff to be computer literate. Also, due to the state and federal privacy regulations, staff needs to understand the laws pertaining to release of information. **19**	The Department received information from a variety of published and first person sources that the average record request is variously 17 to 31 pages. While a 1997 published report indicated 17 pages, record maintainers have unanimously indicated that individuals' records have grown in number over the past 7 years. However, record maintainers vary in their estimates of what the average record request is. Estimates ranged from 23 to 31. In view of the published figure of 17, the Department believes that 25 pages is a reasonable estimate. The Department notes that increasing the average number of records per request may increase some estimated costs, but decrease other estimated costs resulting from an apportionment of costs over an assumed total number

		of records. The Department speculates that growing use of electronic records may be expected to substantially reduce the costs of record reproduction. In addition, one might reasonably expect that any worker, even if only performing clerical functions, would be computer literate; particularly a worker earning a salary in the mid-teens.
18 HFS 117.05	The emphasis on the "five most-time-consuming" tasks means that at least 10 minutes for an average request has not been included in the calculations. The proposed fee should be revised to include these 10 minutes of staff time. **5**	Through published articles and documentation submitted by medical record maintainers, the Department identified 12 steps/tasks associated with reproducing a medical record. In March, 2003, the Department asked both the commenter (Lobbyist for the Association of Health Information Outsourcing Services [AHIOS]) and Chrisann Lemery (President of the Wisconsin Health Information Management Association) for their estimates of the five most time-consuming tasks in reproducing a medical record. The Department's rationale in doing this was to focus on and especially reflect their estimates of the most significant time-consuming contributors to reproducing a medical record. Their responses were largely consistent insofar as they agreed on four of the five most significant steps and the sum of their estimates of associated required time varied by only 10 percent (50 minutes versus 56.5 minutes.) Since other information sources provided much lower estimated times for those five steps (i.e., 34 and 31 minutes), the Department estimated 43 minutes. The commenter states that *"the emphasis on the five 'most time-consuming' tasks means that at least 10 minutes for an average request has not been included in the calculations. The proposed fee should be revised to include these 10 minutes of staff time."* The Department does not accept the commenter's suggestion because the Department added 27 minutes to its estimate of 43 minutes (to account for the remaining relatively less time-consuming activities) to arrive at its estimate of 70 minutes as the average total time required to reproduce a record. The additional 27 minutes is significantly

		more than the additional 10 minutes the commenter suggested.
19 HFS 117.05	The hourly rate used to calculate the uniform fee is unrealistically low. Department staff based the hourly salary on Dunn's $12.40/hour and adjusted for inflation. Unfortunately, the salaries of staff in this very specialized field have increased at a rate higher than inflation. All medical record maintainers responded to the Department with hourly salary figures higher than $15.00/hour. The cost per hour in staff time is at least 37% too low. The per page costs should be increased to reflect the actual salary rate. **5** The average hourly salary used to calculate the uniform fee was $12.40/hour. This salary is based on a 1997 study and is not reflective of the actual salary rate. In fact, record maintainers reported salaries in excess of $15.00/hour to the department. **19**	The Department based its estimates on an average labor cost component of $16 per hour, which was supplied by a member of the Advisory Committee from a large, Milwaukee hospital, i.e., a geographic area that might be expected to have relatively higher compensation. While the $16/hour labor rate was criticized by some representatives of medical record requesters as being too high, the $16 rate was criticized by some medical record maintainer representatives as too low. Since no persons submitting comments on the Department's initial proposed rule supplied substantiation of a higher labor rate (e.g., based on surveys of persons responsible for the requisite work to comply with record requests), the Department has not modified its original estimate of $16/hour.
20 HFS 117.05	Too many of the calculations were based on Rose Dunn's 1997 article. Many of the steps required to fulfill a request for copies of a medical record have become much more complicated since 1997. In the last six years, in addition to inflation, the introduction of new technologies has resulted in equipment and software costs well beyond what Ms. Dunn imagined. The costs to the records maintainers are not just the cost of photocopiers, toner, and drum replacement, but are for computers, customized software, internet access, and the staff training that goes along with each upgrade in technology. It is important to note that substantially all of the upgrades in technology have been implemented to better protect the confidentiality of patient medical records. Compliance with HIPAA has added significant staff time to fulfilling each request. None of this was reflected in the DHFS calculations. **5** The estimates of the costs of personal computers, printers, and software are based on poor assumptions. The Department staff used personal experience with the cost of computers, printers, and software to reduce the cost of this overhead from what had been estimated by Rose Dunn in 1997. While it is true that the average consumer has seen the cost of this equipment go down in the past six years, that is not true for the	The Department received no significant objections to the record reproduction cost model it originally proposed. Neither did the Department receive documentation that the costs that formed the basis of its initial proposed rule were significantly aberrant. While the Department is sympathetic with the assertion that the steps to fulfill a request for copies of a medical record have become much more complicated since 1997, the Department, as it has throughout this process, gives greater weight to assertions that are either: a. supported by documentation; or b. relatively consistent reports among record maintainers. In lieu of either or both of these, the Department has been and remains more reluctant with respect to reported data. The commenter may be correct that the cost of *specialized* software may have increased in recent years, and that an article based on data from before 1997 may be outdated in the relatively fast-changing and evolving area of computer hardware and software. However, the Department has not accepted the

	specialized equipment used in this industry. The cost of customized software has increased significantly and these items have to be updated regularly. Far more money is spent on computers, software, scanners, digital printers, and related equipment today than was spent in 1997. **5**	argument because it has not received any substantiation of those assertions. The Department notes that were it to ***double*** its previous cost estimate associated with software and hardware, doing so would only increase the average cost per request by $0.06.
	The estimates of the cost of insurance are unrealistic. The Department staff used Dunn's article as the basis for the cost of insurance. This number supposedly was adjusted for inflation to determine the cost of insurance in 2003. Unfortunately, the cost of liability insurance, errors and omissions insurance, and workers compensation insurance has increased at a far more rapid pace than inflation, especially since September 11, 2001. The cost of insurance coverage for those who are engaged in the release of patient information has tripled in recent years and is a much more significant part of the cost of providing the service. Inclusion of the true cost of insurance should be addressed in the per page portion of the fee. **5**	The commenter has not presented reasons why the cost of insurance varies based on the number of pages of records reproduced. Therefore, the Department believes that the cost of insurance should continue to be reflected as a component of "cost per request." The Department also points out that it has not obtained from record maintainers actual data on their insurance costs that substantiate claims of a higher insurance costs. Therefore, the Department has not increased its original estimate of insurance costs. The Department notes that were it to assume a 10% annual increase of insurance costs based on the estimate provided in the 1997 Rose article, doing so would raise the estimated cost of insurance from $2,500 to $3,000 and increase the "liability/insurance" cost component by only $0.05 per request.
	The "hard to define costs" were significantly underestimated. The Department estimated the cost of these overhead items at 12% while the Midwest Medical Record Association estimated it at 36%. The "per page" cost of the fee should be increased accordingly. **5**	The Department acknowledges that it relied on Dunn's published estimate of 12% attributable "hard-to-define" nonlabor costs, and that Dunn's estimate is at great variance with the 36% reported by the Midwest Medical Record Association. However, the Department also points out, as it did in footnote "h" to Appendix 2 of its 2003 "HFS 117 Report," that it has probably broken out and reflected some of those "hard-to-define" costs in one or more of the other cost components. In addition, the Department finds it difficult to accept that any successful business has 36% of its costs that are "hard to define." Before making such a substantial change to its cost estimates for a nebulous component such as "hard-to-define" costs, the Department believes such increases should be supported by substantive supporting documentation.
	The cost of records retrieved from off-site storage must be included.	As it stated in footnote "k" to Appendix 2 of its 2003

	AHIOS estimates that off-site storage is involved in 20% of all requests. The average charge for each chart retrieved from an off-site storage facility is $17.00. The per page charge should be adjusted to include the cost of retrieval from off-site storage facilities. **5**	"*Department HFS 117 Report*," the Department was open to, but did not, reflect the cost of off-site storage and retrieval of records in its original cost estimates because it did not have sufficient data upon which it could derive such an estimate. In a separate document, "*Comments on Department HFS 117 Preliminary and Interim Reports and Department Responses*," the Department stated that it would consider incorporating a separate charge for off-site storage of records if it received a persuasive rationale for why the $0.84 per request it was incorporating as an approximation of "physical space" costs (see Appendix 2 of the "*Department HFS 117 Report*") was not a sufficient reflection of medical record storage. To date, the Department has not received such a rationale. Nor has commenter #5 supported her assertion with documentation of experienced charges. In lieu of supporting or verifiable data, the Department is reluctant to accept and incorporate asserted off-site storage and retrieval costs amounting to $3.40 per request (20% x $17), an increase of about 20%.
	The sum of all of the additional staff time and overhead costs of each of these items equates to a per page charge of at least $1.37. This compares to the 31 cents/page proposed in the propose rule. **5**	The Department disagrees. Incorporating those increases in the "per page" component of the cost model would be contrary to the fact that the vast majority of those costs are attributable to complying with a request for record reproduction regardless of the size of the request. In other words, those costs (computer hardware and software and insurance) are relatively fixed and should not increase significantly in correspondence with an increase in number of copies made.
	Not only has the Department ignored these data, but it appears that the Department has responded to emotion, rather than facts, in creating this draft. **5**	The Department has not ignored these data. Indeed, as the Department has said elsewhere in this document, the actual cost of complying with a request to reproduce medical records may indeed be higher than the fee limits the Department has proposed. While the Department has attempted, throughout this process, to reflect new information into its cost model, at this stage of the rule's promulgation, the Department

		is reluctant to reflect cost levels that are asserted, but unsubstantiated.
21 HFS 117.05	Urges DHFS to statutorily mandate an annual cost of living increase for medical record copy fee costs. As written, the rule does not address this issue. **29** An annual "cost of living" adjustment must be included. The Department has interpreted the directive in the law to mean that the uniform fee must be revised every three years, and not more often. In the negotiations that resulted in this law, there was agreement by all parties (AHIOS, Wisconsin Health Information Management Association, the Insurance Alliance, and the State Bar of Wisconsin) that the language would not preclude the inclusion of annual cost of living adjustments. All parties agreed that the Department would make the determination about the inclusion of an annual adjustment. On the other hand, the State Bar and Insurance Alliance were very interested in specific language directing the Department to completely review the uniform fee and its relationship to actual costs of providing the service because they were convinced that, as more and more records are maintained electronically, there would be a significant reduction in the costs associated with the service. However, they fail to recognize the enormous capital outlays required to invest in the equipment and software development necessary to implement electronic medical records and make electronic delivery of those records a reality. AHIOS was not opposed to a full review in three years because we recognized that the implementation of new technologies within hospitals and clinics was not happening as quickly as believed and because the implementation of new technologies does not immediately, and may never, result in a reduction in the cost of a service, mostly due to tremendous capital investments in equipment. Throughout its Report, the Department has used adjustments based on inflation to justify its proposed fees. Similarly, the uniform fee which is set should be adjusted using a standard cost of living mechanism. Many other states implement an annual adjustment. **5** The proposed rule fails to include cost of living increases for medical record fees. The rule requires revision no more often than every 3 years. Coupled with the absence of a required cost of living increase, this will result is a growing gap between the cost of providing records and the fees paid for the records. **19**	Section 146.83(3m)(b) of the statutes directs the Department to revise the HFS 117 rules every three years to account for increases or decreases in actual costs. In fact, unless the legislature changes paragraph (b), the Department must initially revise the rules by January 1, 2006. Consequently, the Department must begin its first periodic reassessment in 2005. Given the current relatively low rate of price and wage inflation, and the likely odd-numbered fee limits resulting from such annual adjustments, and the Department's desire for the fee limits in the rule not to be confusing and subject to misapplication, the Department believes it is both unnecessary and unwise to specify automatic adjustments in the rule. While fee limits in other states may be adjusted annually to reflect inflation, such adjustments are normally statutorily required. If the Wisconsin legislature desires such annual adjustments, they may so specify in section 146.83 (3m) or request the Department to do so in the course of their review of the Department's final proposed rule.

22 HFS 117.05	Urges DHFS to include language in HFS 117 clarifying that providers may charge medical record requestors for sales tax and the cost of postage. While this is already currently mandated in Wisconsin law, clarification in HFS 117 would further document this requirement. **29**	The Department's proposed rule in HFS 117.05(2) and (3) contains a note stating that "sales taxes, if applicable, also may be added to the fees charged…" As the commenter may know, notes in rules have no legal effect, but only clarify and provide information to the reader. The Department has elected to not refer to the issue of sales tax in the body of the rule because the Department's rule has no bearing on whether or not sales tax is applicable and nothing the Department says in the rule about the applicability of sales tax affects the current or future reality of such requirements anyway. The applicability of sales tax to a particular transaction is the purview of the legislature and the Department of Revenue. Therefore, it would be inappropriate for the Department to allude to sales tax in the substantive provisions of the rule.
23 HFS 117.05	The per page fees that have been established do not realistically reflect the costs that Dean incurs when it prepares a copy of a medical record or when it contracts with a third-party to carry out these duties for us. Not all patients request copies of their medical record. The costs for duplicating records should be borne by those who require this service. a. **Labor costs:** The fees that are established for the costs of reproducing the records are not consistent with our experience as a health care provider who responds to these requests. Dean is concerned that the Department does not fully understand all of the elements that are involved when responding to a request for information. The process of responding to a request for medical records is not a simple one. A person cannot just pull a record off of a shelf, toss it into a copy machine, and stand there watching the copies come out. Many labor-intensive steps are required which may include analyzing what information is being requested; if the authorization presented is valid, what the release signed by the patient will allow to be released; what information the medical record contains; what portions of the record should be copied in response to the request. The Advisory Committee for the Revision of Chapter HFS 117 was presented with information regarding the labor involved in processing a request for medical records. Dean is concerned that the Department disregarded this information when it established the proposed fees. If the person preparing the copies is not properly trained, information may be released inappropriately. This exposes the health care provider to claims by the patient of a breach of	Whether the costs of duplicating records should be entirely borne by those who require such duplication is a debatable issue. However, the Department's charge from the legislature to "prescribe fees that are based on an approximation of actual costs" implicitly is consistent with the commenter's contention that the costs for reproducing a medical record should be borne by the requester. The Department's approach, which the Advisory Committee endorsed, has been to calculate the cost of record reproduction based on a combination of published studies and experiences reported to the Department by medical record maintainers. If the results of those calculations vary significantly from the actual costs experienced by record maintainers, then it has been incumbent on record maintainers to document and substantiate those variations where applicable. The Department has been told (not always gently) that it doesn't fully understand all of the elements that are involved when responding to requests for medical records. The Department points out that the process it used to derive its proposed fee limits has been both ***methodical*** and ***open***. From the beginning of its effort, the Department stated that its intent was to develop a

	confidentiality under state law, and/or violations of the HIPAA regulations which could result in fines and penalties imposed on the health care provider. Health care providers must either thoroughly train their staff to process these requests or hire a reliable third party to handle this work. This is not a job that can be handled by any person off the street. **Recommendation:** The Department should consider actual labor costs when establishing the fees for copies of medical records. b. **Equipment costs:** In addition to the labor costs, the other significant expense in duplicating medical records is the cost of equipment that must be maintained. The equipment includes high capacity copy machines as well as personal computers, printers and scanners. Dean is in the process of migrating to an electronic medical record. This equipment is necessary in order to maintain and reproduce medical records maintained in an electronic format. **Recommendation:** The Department should consider actual costs for equipment when establishing the fees for copies of medical records. **20** The fee structure prescribed by HFS 117 does not begin to cover the actual costs our vendor incurs in fulfilling record requests. **23** The proposed fees do not represent an approximation of the actual costs to furnish copies of health care records, as required by law. AHIOS's December 15, 2003 testimony provides further analysis of the actual costs of furnishing the services compared to the fees prescribed in the proposed rule. WHA asks that the proposed fees be increased to represent the actual costs of furnishing copy services. **31**	rule that complies and consistent with what it believes to be applicable state and federal law, and is based on an approximation of actual medical record reproduction costs. Toward that end, in late February 2003, the Department identified and shared with its advisory committee (half of whom represented medical record maintainers) its proposed approach of, among other things, approximating record reproduction costs by attempting to identify the component tasks and estimated costs associated with medical record reproduction. The Department did not receive ***any*** objections to its proposed approach. Further, the Department invited all advisory committee members and others (who were following the process via the Department's website) to submit pertinent information that would aid the Department in its effort. Based on the information the Department subsequently received (almost entirely from medical record maintainers), the Department proposed fee limits based on the melding of the often discrepant data and its best estimation of actual record reproduction costs. However, the Department has elected not to revise its estimates based on unsubstantiated claims that significantly vary from the results achieved by its cost model methodology. As the Department noted in its background documents of April 2003, not all of the information the Department received regarding the cost and required time to complete the individual steps in the record reproduction process was consistent. Consequently, the Department had to sift, winnow and judge what represented the best cost input in the face of conflicting information. The Department did not disregard any of the information it has been presented with. However, the Department has attempted to give greater standing to data that is reputable, credible and substantiated, i.e., supported by verifiable data.
24 HFS 117.05	The proposed fees do not cover actual costs and the commenters' facilities will be forced to recoup those incurred losses by raising its rates for other services the facility provides. Charging customers for services	The Department has attempted to specify a fee limit that approximates actual costs of reproducing a medical record. It has attempted to do so fairly and

	they did not receive is not in the broad public interest. **24, 17, 18, 6, 23, 21, 31, 35** The fees charged to patients who request copies of their records, or to third parties requesting the record of a specific patient, should accurately reflect the cost of reproducing the records. If the mandated fees are set at a rate that does not cover the overhead costs, the health care provider will be required to subsidize the process. Health care providers may be forced to pass on this additional expense to their patients in the form of increased medical costs. The effect would be that all patients would bear the cost of this service, rather than patients who benefit from the service. **Recommendation:** It is important that the Department considers all of the elements involved in copying a medical record, so that the fee is set at a fair rate to reimburse the health care provider or any vendors it retains for generating the copies. **20** If the rates established by the Department do not consider the costs of production a copy of the records, including the cost of labor and equipment, health care providers such as Dean Health Systems, Inc. may be forced to subsidize the process of duplicating medical records. If this happens, the costs may be passed on to all patients, not just those who require copies of their records. This may further drive up the costs of health care. Establish fees that are reasonable so the costs for duplicating records will be borne by the patients who require this service and the entities that require this information. **20** Underpayment for copies of medical records will likely result in cost-shifting, meaning that all patients will subsidize the requests of patients receiving records at a cost substantially below the cost of compiling them. The rule should be revised so that the costs of record requests are born by individuals making the request. **19** AHIOS members and the medical facilities are being asked to subsidize (insurance company and attorney requester) businesses. A medical record requestor who is requesting records in the course of performing their profit-making enterprise should pay the full cost of locating, retrieving, handling, copying, and forwarding the medical records. If health care providers are required to provide copies to attorneys and insurance companies at less than the actual cost of retrieving and copying the documents, then passing the proposed rule would economically force outsourcing companies to drastically cut service levels	prudently, based on all available information. By extension, the Department's attempt to do so implies that the Department does not believe that cost shifting is either appropriate or necessary. In lieu of more rigorous and verifiable data however, the Department cannot say for certain that its resultant final proposed fee limits actually do approximate the actual (average) cost of reproducing a medical record.

	or pass the costs on to the healthcare providers, who in turn, will pass the costs on to their patients. **5** Ultimately, of course, the effect of this effort to adopt a lower base fee and per page fee is to shift the cost of providing duplicate copies of medical records to those patients who never have a reason to request copies of records for litigation or an insurance claim. The cost of providing the service of duplicating records will have to be covered by the health care provider and if the third party requestors do not have to cover the actual costs of the service, the fees charged to all patients of the hospital or clinic will have to be increased so that the costs of copying medical records are covered. **5** Attorneys, authorized by the patient, may review records at a health care facility at NO COST. However, when an attorney asks for a service for their convenience, that service being the processing and delivering of confidential medical information, it should be expected that they pay a competitive rate for that service. Instead, based on the proposed HFS 117 ruling, SOURCECORP and our clients are being asked to subsidize these attorneys that are seeking to profit from an action filed by a plaintiff. Attorneys have their own economic interests in obtaining these documents, and there is no reason that they should not pay for the service of locating, retrieving, handling, copying and delivering the medical records. **3** The unintended consequence will be to shift millions of dollars of the cost of producing these records from the requester to the healthcare provider – unnecessarily fueling the rising cost of care. **23** The proposed rule changes will increase costs to hospitals and clinics that provide copies of medical records to attorneys and insurance companies. It may also force companies such as ours to either pass additional costs on to hospitals and clinics, or force us out of business altogether. We currently provide copies of medical records to over fifty percent of requestors **free of charge.** The only way we can maintain this level of service is to charge reasonable fees to the remaining fifty percent. The proposed rates would mean a reduction in billed dollars in excess of 30 percent, something that would make it impossible to remain in business. **2, 34** Increase the proposed mandated rate for the benefit of patients,	

	healthcare providers, and organizations like ours that provide a needed service for the community. **2, 34** If the adoption of the proposed fee structure would be imposed, it would severely affect our company's ability to stay in business. Jobs would be lost, and our company and our health care clients would be required to pass additional costs on to patients in order to help defray the cost of providing processing services and copies to attorneys and insurance companies at less than actual costs. The fee structure proposed in HFS 117 is substantially less than the actual costs of providing a service. **3**	While the Department sympathizes with the commenter's assertions, the Department must adhere to its cost component model as the only reasonable approach to empirically approximating the cost of reproducing medical records. The Department would encourage the commenter (and others unhappy with the resultant fee limits) to perform a rigorous analysis of the costs of reproducing records and present that documentation to the Department at the next opportunity to revise these rules.
25 HFS 117.05	Although the mandated rates in IL and MN have forced a compromised approach to ROI services performed in those states, their mandated fee structure is reasonable and allows for our company to remain in business and for the health care provider not to penalize their patients due to providing attorneys and insurance companies ROI services at below cost levels. Based on an average request resulting in 31 pages, the Wisconsin proposed fee structure is 53% less than our neighboring states of IL and MN. As the processes involved are identical in those states, it is difficult to understand what rationale was used to develop a fee structure that is one-half of Illinois and Minnesota designated rates. The current mandated fee structure in MN supports a $13.79 processing and retrieval fee and a $1.05 per page charge. The IL fee structure supports a $20.48 processing and retrieval fee and a $.77 per page charge. Both have annual inflation adjustments based on standard cost of living increases. Therefore, based on an average request of 31 pages, the MN fee structure would support a charge of $46.34 and in IL a charge of $44.35. This is only a 4% variation, far from the 53% that is proposed in HFS 117. The proposed HFS 117 fees should be re-visited, and a new fee structure should be proposed that models a consistency with our neighboring states. **3** Other states have mandated copy fee limits that are in excess of $20.00 base fee per request. **2, 34**	As directed by the legislature, the Department has attempted to approximate the actual cost of reproducing medical records and base its fee limits on those estimated costs. The legislature did not direct the Department to base its fee limit on an average of those specified in surrounding states. Moreover, the Department does not know if either Illinois or Minnesota bases its fee limit on a similar approximation of costs. Admittedly, it would have been much, much easier for the Department to simply propose a fee limit that is an amalgam or average of those in surrounding states. The Department notes that the fee limit in Illinois is specified in statute, not administrative rule.

26 HFS 117.05	Asserts that regulation and a uniform fee structure are absolutely necessary because medical record maintainers are using their monopoly position to overcharge medical record requesters. Advocates adopting the fee structure currently in place for worker's compensation and personal injury claims. **28**	The Department's legislative directive was to prescribe fees that are based on an approximation of actual costs. Adopting the fee structures established by other programs would be contrary to the legislative directive.
27 HFS 117.05(2)	HFS 117.05 needs to reference Wis. Stat. 146.83(3m)(a) and 45 CFR 164.524(c)4 to explain what is included in the fee. **6**	The Department believes that sections 146.83(3m)(a) and 45 CFR 164.524(c)(4) do not need to be referenced in HFS 117.05(2). HFS 117.05(2), as proposed by the Department, reflects and is consistent with the requirements of the federal law. The cost model the Department constructed to estimated the fee limits conformed with the requirements of sub. (3m)(a), and the fee limits expressed in HFS 117.05(2) reflect the circumscribed cost components expressed permitted under 164.524(c)(4).
28 HFS 117.05(2)	DHFS does not have the statutory authority to promulgate proposed HFS 117.05(2). DHFS appears to rely on federal law, namely HIPAA, as the rationale for the promulgation of proposed HFS 117.05(2), overlooking the explicit language in sections 146.83(3m) and 908.03(6m)(d). DHFS's authority is in state law, not federal law, and thus WHA requests that HFS 117.05(2) not be promulgated. **31**	As it states in HFS 117.01, the Department recognizes that its authority to promulgate HFS 117 emanates from the state statutes the commenter specified. The fee limits specified in HFS 117.05(2) are applicable solely to individuals and their personal representatives. The Department recognized these lower fee limits because federal HIPAA regulations mandate that the fee limit for individuals and their personal representatives reflect only the cost of copying and postage. HIPAA controls the record activities of most health care providers and health plans. Were the Department to create requirements in HFS 117 that were not compatible with those expressed in federal HIPAA regulations and commentary, HIPAA would supercede anyway, and the lack of HIPAA recognition in the HFS 117 rules would create great confusion for the public on what charges are allowable. Given that "copying" is a variable expense, dependent largely on the number of pages copied and a small share of associated/attributable costs, the Department has proposed that only the "per page" portion of its derived fee limit (without the "per request" portion) be stated as the limit applicable to individuals' requests for copies of their own records. The Department believes that doing

		otherwise would not, broadly, be in the public's best interests.
29 HFS 117.05(3)	The Department should propose a $20.00 late fee for records not received within ten days. Section 908.03(6m)(c)3., Stats., states that record maintainers must provide certified copies of all records within two (2) business days. This rarely happens. (It is almost impossible to receive medical records within two (2) business days; therefore, the ten day limit.) The Department should consider including an additional late fee of $25.00 for all medical records that need to be "second or third requested" and received after 30 days. This fee would be similar to the requested retrieval fee by the health care providers and /or copy services. **30**	The Department believes it lacks statutory authority to impose late fees and penalties, and that, consequently, such sanctions are outside the scope of HFS 117. The Department believes that if the legislature sees the merit of such fees, the fees should be specified in statute. Finally, the Department reminds readers that it has no authority to enforce any of the provisions of HFS 117.
30 HFS 117.05(3)	Advocates that record copying fees be recoverable under sections 814.03 and 814.04 of the statutes. Acknowledges that a revision of 814.04 (2) would be necessary. **30**	As the commenter acknowledges, it is up to the legislature to do so if they wish.
31 HFS 117.05(3)	States that the Department originally proposed a retrieval fee limit range of $14 to $21, which AHIOS supported. Objects to the Department subsequently lowering the base fee to $12.50 and $15.00 without the benefit of additional data to support the change. **5**	The Department originally proposed a retrieval fee limit range of $14 to $21 because it was the ***range*** arrived at by reflecting (or not) the cost components of "profit" and "bad debt." The Department attributed a 10% amount to reflect "profit" and a 40% amount to reflect what the Department was told represented "bad debt," i.e., the amount of work medical record maintainers perform for which they are not ultimately paid. The Department originally stated that range because it was undecided as to whether or not to reflect these two factors in its calculation of a fee limit. Not reflecting either would have resulted in a retrieval fee limit component of $14, while reflecting both would have resulted in a retrieval fee limit of $21. The Department asked its Advisory Committee whether or not to include either of both factors in the calculation of the fee limit, but members were evenly split on whether to do so. Not surprisingly, medical record maintainers wanted to reflect both factors in the fee limit while medical record requesters did not. The Department subsequently elected to reflect the factor of "profit" in its calculations of actual cost, but not "bad debt" because it believes that bad debts can or should be controllable by a

		service organization. The Department subsequently proposed a two-tiered retrieval fee of $12.50 and $15.00 under the premise that a medical record maintainer's cost to retrieve a few pages of records was, on average, less than that required to retrieve substantially more pages.
32 HFS 17.05(3)(c)	The proposed fee limits for certifying records would be acceptable if all of the following were true: 1. When a legal request for medical records is made, after the filing of a court action and pursuant to a signed HIPPA authorization, the copy service must comply with that legal request. The authorization must be read by that copy service employee and fulfilled as noted. Health care provider "policy" regarding release of the patients' medical file does not override a signed HIPPA compliant authorization. 2. The certification forms for medical records, used by the health care providers and/or copy services must be complaint with WI Stats 908.03 (6m) (c) 3. which: "... require the records custodian to indicate the specific dates of treatment." This means a specific beginning and ending date. Treatment dates ending with "to the present" is not compliant with statutes. Often in review of the certified medical records received, "to the present" results in a last treatment date, years before "the present" date. 3. The records are in compliance with WI Statutes: §908.03(6m)(c)3. If the medical records are not an **accurate, complete duplicate copy of the entire medical file**, which is my standard request noted in the signed HIPPA authorization, a fine will be imposed for falsifying the certification. I am recommending a fine of $50.00 per occurrence which should be imposed and collected by the requesting law firm, from the health care provider and/or copy service who falsifies the certification of the medical records. In the first draft of the rule, DHFS staff used the data to create a certification fee that recognized the extra effort involved in certifying a record for use in court. The fee was proposed to be $7.50 per record, which was based on the review of an average record. It should be noted that this is the same fee for certification that is codified in at least one state's statute (Georgia – O.C.G.A 31-33-3, which is subject to a CPI increase each July and is currently at $8.54). Without any logical rationale, the second draft creates two tiers and the language is completely illogical. To administer two sets of base fees and two sets of	Instance #1 has no bearing whatsoever upon the Department's setting of fee limits in HFS 117. It is an enforcement issue over which the Department has no power. With respect to #2, this again is an enforcement issue that has nothing to do with the setting of fee limits. The Department can't control the manner in which certifications are worded. All the Department has the authority to do is to designate maximum fees. With respect to #3, only the legislature can declare a situation to be a crime, and only the legislature can designate a fine as a penalty for that crime. Criminal penalties can only be imposed if the criminal defendant has been prosecuted, convicted, and sentenced in court. There is no possible way that an attorney could personally impose a fine. The Department has no authority whatsoever over enforcement. In fact, the existing statute language in s. 908.03(6m) already contains an enforcement mechanism, which is subpoenaing the record custodian to appear in court if the record custodian has failed to properly supply records. The Department originally proposed a certification fee of $7.50 to reflect the costs a medical record maintainer was estimated to incur in certifying a set of records. Subsequently, based on the premise that it is less costly for a medical record maintainer to certify a few (less than five) pages of records, the Department proposed two tiers of certification fees ($5.00 and $7.50.) The commenter does not indicate why two tiers of fees is illogical and does not offer reasons for

	certification fees is an unnecessary added burden to the health care provider. The rule, in this latest version, will mean more work and increased costs for health care providers. **5**	refuting the premise that certifying a small number of records may entail less time and effort than a large volume of records. If it is correct that the amount of time expended in certifying records is at least somewhat a function of the number of records, the Department may be justified in proposing several additional fee limit levels beyond the two it has proposed. In addition, if such were the case, the lowest fee level might be lower than the $5.00 the Department has proposed. For these reasons, the Department has not modified its originally proposed two-tiered fee limit structure.
	The fee for certification of records seems excessive when you consider what little time is required to do the work of certification. Especially the $5.00 fee for just a couple pages. It takes only a few seconds to generate the page and verify the records. **33**	The Department believes that certifying medical records is not as simple as the commenter suggests. Certifications are performed by more highly paid management personnel, and the review of the records takes an average of 10 to 20 minutes.

- Modifications to Initial Proposed Rule

Based on comments received from the Legislative Council Rules Clearinghouse, the Department made minor wording changes to its initial proposed rulemaking order. In addition, the Department modified s. HFS 117.03 (3) to clarify that the term "health care records" has the meaning given in s. 146.81 (4), Stats., and modified the "plain language analysis" section of the rulemaking order to comply with the requirements of 2003 Wisconsin Act 118.

Sections 146.83 (3m) and 908.03 (6m) (d), Stats., directs the Department to "develop realistic estimates of actual patient record reproduction costs based on an approximation of pertinent costs associated with accomplishing such reproduction." The Department believes its approach to specifying fee limits that approximate actual record copying costs has been methodical, rational, open, and responsive to legislative directive. However, the Department cannot offer the legislature assurance that these proposed fee limits indeed are the costs experienced by the "average" entity that maintains medical records. Short of performing or overseeing a rigorous time-study-based analysis of medical record maintainer practices, or examining verifiable record maintainer operational cost data, the Department is limited to compiling estimates that are based almost solely on published data, and, in the face of conflicting or unsubstantiated data supplied by medical record maintainers, the Department's own estimates. The Department recognizes the inherent conflict that record maintainers have between the Department partial reliance on them for the cost information on which the fee limits are based and medical record maintainers' legitimate desire to maximize their revenue by working to secure the highest possible HFS 117 fee limits. Furthermore, the Department also recognizes that medical record maintainers operate in a monopolistic environment insofar as they are the sole source of medical records for the care individuals receive at a given healthcare provider. Consequently, individuals cannot "shop around" for the best record copying price.